Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor

HIGH COURT (MELAKA) — JUDICIAL REVIEW NO MT1-13-1 OF 2005
LOW HOP BING J
29 NOVEMBER 2006

Administrative Law — Exercise of judicial functions — Judicial review — Jurisdiction of consumer claims tribunal — Whether tribunal had jurisdiction to decide on consumer claims regarding service of telecommunications — Consumer Protection Act 1999 s 2(2)(g) — Communications and Multimedia Act 1998

Public Utilities — Consumer — Telecommunications — Whether consumer claims tribunal had jurisdiction to decide on consumer claims regarding service of telecommunications — Consumer Protection Act 1999 s 2(2)(g) — Communications and Multimedia Act 1998

Public Utilities — Telecommunications — Consumer protection — Whether consumer claims tribunal had jurisdiction to decide on consumer claims regarding service of telecommunications — Consumer Protection Act 1999 s 2(2)(g) — Communications and Multimedia Act 1998

The applicant billed the second respondent for RM98 in relation to international calls said to be made by the second respondent to Papua New Guinea. The second respondent disputed the bill and filed a claim with the first respondent, the Consumer Claims Tribunal ('the tribunal') on the ground that the second respondent had not made the international calls, but had only used the internet service, and that an international call was generated by the internet service without his consent. The tribunal found in favour of the second respondent on grounds of wire-tapping from an unidentified person who had made the international calls while the second respondent was surfing the internet and the second respondent's computer was hacked. The applicant applied for judicial review of the tribunal's award on the ground that the award was beyond the tribunal's jurisdiction and therefore ultra vires. The applicant submitted that the Consumer Protection Act 1999 ('the CPA 1999') does not apply to any trade transaction effected by electronic means unless otherwise prescribed by the Minister. They added that the service of telecommunications provided by the applicant involved electromagnetic waves to which the CPA 1999 had no application by virtue of s 2(2)(g) thereof, but came within the provisions of the Communications and Multimedia Act 1998 ('the CMA 1998').

Held, allowing the application:

(1) In view of the dictionary meaning of 'telecommunication', and also the

statutory definition of the word 'communications' in s 6 of the CMA 1998, there was no doubt that s 2(2)(g) of the CPA 1999 has effectively excluded the application of the CPA 1999 to trade transactions effected through the communication of electronically transmitted waves, eg telephone (see para 23).

(2) While the CMA 1998 was clearly enacted to, inter alia, provide for consumer protection in the telecommunications industry, the CPA 1999 is not intended to apply to the hearing of a dispute arising from the same industry (see para 25).

(3) The second respondent had elected the wrong forum to bring the dispute to the tribunal as it was outside the jurisdiction of the tribunal. The second respondent had a choice of suing in a civil court of law or alternatively lodge a complaint under s 188(1)(a) and (b) and s 190(1)(b) of the CMA 1998 for a resolution of the dispute and to get redress if any. Therefore the award was made by the tribunal in respect of a subject matter beyond its jurisdiction and ultra vires (see paras 26–28).

[Bahasa Malaysia summary

Pemohon mengenakan bil kepada responden kedua sebanyak RM98 berkenaan dengan panggilan-panggilan antarabangsa yang dikatakan dilakukan oleh responden kedua ke Papua New Guinea. Responden kedua mempertikaikan bil tersebut dan memfailkan satu tuntutan kepada responden pertama, Tribunal Tuntutan Pengguna ('tribunal tersebut') atas alasan bahawa responden kedua tidak membuat panggilan-panggilan antarabangsa tersebut, tetapi hanya menggunakan perkhidmatan internet, dan panggilan antarabangsa tersebut telah dijana oleh perkhidmatan internet tanpa kebenarannya. Dapatan tribunal berpihak kepada responden kedua atas alasan pemasangan wayar oleh seseorang yang tidak dikenali yang telah membuat panggilan panggilan antarabangsa tersebut semasa responden kedua melayari internet dan komputer responden kedua telah diceroboh. Pemohon memohon untuk semakan kehakiman ke atas award tribunal atas alasan bahawa award tersebut adalah melampaui bidang kuasa tribunal dan ianya adalah ultra vires. Pemohon menghujahkan bahawa Akta Perlindungan Pengguna 1999 ('CPA 1999') tidak terpakai kepada apa-apa transaksi perdagangan melalui cara elektronik melainkan dinyatakan sebaliknya oleh kementerian. Mereka menambah bahawa perkhidmatan telekomunikasi yang disediakan oleh pemohon melibatkan gelombang elektromagnetik yang mana s 2(2)(g) CPA 1999 adalah tidak terpakai, tetapi termasuk di dalam peruntukan Akta Komunikasi dan Multimedia 1998 ('CMA 1998').

Diputuskan, membenarkan permohonan:

(1) Berdasarkan kepada maksud kamus berkenaan dengan telekomunikasi dan juga definisi statutory berkenaan dengan perkataan komunikasi di dalam s 6 CMA 1998, adalah tidak dinafikan bahawa s 2(2)9g) CPA 1999 secara efektifnya tidak memasukkan pemakaian CPA 1999 kepada transaksi perdagangan memalui komunikasi yang dihantar melaui gelombang elektronik, sebagai contoh telefon (lihat perenggan 23).

(2) Semasa CMA 1998 secara jelasnya digubal, antara lain menyediakan kepada pengguna perlindungan di dalam industri telekomunikasi, CPA 1999 adalah tidak bertujuan digunakan untuk pendengaran bagi pertikaian yang timbul daripada industri yang sama (lihat perenggan 25).

(3) Responden kedua telah memilih forum yang salah dalam membawa pertikaian kepada tribunal yang mana ianya adalah diluar bidangkuasa tribunal. Responden kedua mempunyai pilihan untuk mendakwa di mahkamah sivil ataupun secara alternative membuat aduan di bawah s 188(1)(a) dan (b) dan s 190(1)(b) CMA 1998 untuk memutuskan pertikaian dan mendapatkan tebus rugi jika ada. Oleh yang demikian award yang dibuat berkenaan dengan perkara tersebut adalah melangkaui bidangkuasanya dan ultra vires (lihat perenggan 26–28).]

Notes

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 119–132.

For cases on telecommunications generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1914-1916

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Lim Sew Hong v Contraves Advances Devices Sdn Bhd & Anor [2006] 2 AMR 770 (refd)

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Consumer Protection Act 1999, ss 2(2)(g), 85

Communication and Multimedia Act 1998, ss 6, 188(1)(a)&(b), 190(1)(b)

Rules of the High Court 1980, O 53

Vicknaraj Thanarajah (Munawirah bte Mohamad with him) (Abdul Raman Saad & Associates) for the applicant.

Suzana bte Atan (Senior Federal Counsel, Consumer Claims Tribunal, Ministry of Domestic Trade and Consumer Affairs) for the first respondent.

Tan Boon Kheng (in person) as second respondent.

Low Hop Bing J:

APPLICATION

[1] Before me are two substantive notices of motion filed respectively by the applicants for the purpose of seeking judicial review by way of certiorari under O 53 of the Rules of the High Court 1980 to quash the awards handed down by the first respondent, the Consumer Claims Tribunal (the tribunal) on 25 January 2005.

A **[2]** The applicants relied on the common ground inter alia that the awards are beyond the tribunal's jurisdiction and therefore ultra vires.

[3] Although the value of the subject matter is in the miniscule sum of RM98 in each application, the issue raised for my consideration is of immense importance and
B far-reaching implications. It concerns public interest and affects every spectrum of the telecommunication consumers nationwide.

FACTUAL BACKGROUND

C **[4]** The facts in both the applications are substantially similar and so a reference to the second respondent herein is a reference respectively to the second respondent in both the applications.

[5] The tribunal was established under s 85 of the Consumer Protection Act 1999 ('the CPA 1999') for the purpose of hearing claims for any loss suffered on any matter
D concerning the consumer's interest. The jurisdiction of the tribunal is subject to certain limitations prescribed under the CPA 1999.

[6] The matter before the tribunal originated from two RM98 bills delivered by the applicant to the second respondent respectively in relation to international calls said
E to be made by the second respondent to Papua New Guinea.

[7] The second respondent disputed the bill and filed a claim with the tribunal on the ground that the second respondent had not made the international calls, but had only used the internet service, and that an international call was generated by the
F internet service without his consent.

[8] The applicant at the direction of the tribunal launched a comprehensive investigation and produced a report which basically illustrated that the telecommunication lines and the telecommunication boxes connected to the second
G respondent's telephone were in good working order.

[9] The applicant also investigated the internet service provider, TMNET Sdn Bhd which is a legal entity separate and distinct from the applicant, and which provides a different service to the second respondent as a subscriber specifically for a 'dial-up
H internet connection' ie the TMNET 1515 service.

[10] The report and the bills of both the internet service provider and the telecommunications service provider showed that at the time the calls were charged, the second respondent was accessing the internet when a dialer downloaded to the second respondent's computer which resulted in the making of international calls.
I The second respondent did not dispute the existence of these internet and telecommunications services.

[11] The tribunal found in favour of the second respondent on grounds of wire-tapping from an unidentified person who had made the international calls while

the second respondent was surfing the internet and the second respondent's computer was hacked.

GOVERNING PRINCIPLES

[12] At this juncture, it is appropriate for me to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of certiorari, as follows:

(1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;

(2) It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed; and an error may be disclosed if the decision-maker eg:

(a) asks himself the wrong question;

(b) takes into account irrelevant considerations;

(c) omits to take into account certain relevant considerations (an anisminic error);

(d) misconstrues the terms of the relevant statute; or

(e) misapplies or misstates a principle of general law.

(per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317, p 343);

(3) In process or substance, an impugned decision is flawed on ground of:

(a) illegality, meaning that the decision must be based on law and the decision-maker must understand directly the law that regulates his decision-making power and must give effect to it, and whether he has or not is par excellence a justiciable question;

(b) irrationality meaning 'Wednesbury unreasonableness', so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, as enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223;

(c) procedural impropriety covering failure:

(i) to observe basic rules of natural justice;

(ii) to act with procedural fairness;

(iii) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; and

(4) possibly, proportionality.

(per Edgar Joseph Jr FCJ in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 pp 186–187; referring to the judgment of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374).

(See my judgment in *Lim Sew Hong v Contraves Advances Devices Sdn Bhd & Anor* [2006] 2 AMR 770 at pp 773–775).

JURISDICTIONAL ERROR

[13] The ground relied on by the applicant relates to jurisdictional error which is a specific ground within the ambit of the broader doctrine of error of law on the face of the record, as enunciated in principle (1) above.

[14] It was submitted by Mr Vicknaraj Thanarajah (assisted by Ms Munawirah bte Mohamad) that the CPA 1999 does not apply to any trade transaction effected by electronic means unless otherwise prescribed by the minister. They added that the service of telecommunications provided by the applicant involves electromagnetic waves to which the CPA 1999 has no application by virtue of s 2(2)(g) thereof, but comes within the provisions of the Communications and Multimedia Act 1998 ('the CMA 1998').

[15] Learned senior federal counsel, Ms Suzana bte Atan, appeared for the first respondent on 5 December 2005 and requested for time to reply to the issue raised under s 2(2)(g). She was given time to file written submission on or before 6 February 2006. However no such submission has been presented for the tribunal.

[16] The second respondent appeared as a lay person and so did not submit.

[17] In my judgment, the relevant portion of s 2 of the CPA 1999 merits reproduction as follows:

Section 2. Application

(1) Subject to subsection (2), this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade

(2) This Act shall not apply:

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(g) to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

(3) Notwithstanding subsections (1) and (2), this act shall apply to any matter prescribed under section 103.

(4) The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

[18] As there was no submission that the minister has prescribed any trade transactions under s 2(2)(g) of the CPA 1999, the question before me is whether the disputed transaction between the applicant and the second respondent comes within the ambit of the first limb to s 2(2)(g).

[19] As alluded to above, there is apparently no dispute that the applicant provides and the second respondent receives telecommunication services.

[20] The long title to the CMA 1998 says that it is an act to provide for and to regulate the converging communication and multimedia industries and for incidental matters. It has repealed the traditional Telecommunications Act 1950 and the Broadcasting Act 1988.

[21] Section 6 of the CMA 1998 defines 'communications' as any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms. In my view, this definition in s 6 is wide enough to cover telecommunications, although the word 'telecommunications' has not been denned in the CMA 1998.

[22] In the circumstances, the ordinary dictionary meaning of that word shall apply. According to the *Lexicon Webster Dictionary* Vol II, 'telecommunication' is the science of communication of electronically transmitted waves of radio, radar, telephone, telegraph and the like.

[23] In view of the above dictionary meaning of 'telecommunication', and also the statutory definition of the word 'communications' in s 6 of the CMA 1998, I have no doubt that s 2(2)(g) of the CPA 1999 has effectively excluded the application of the CPA 1999 to trade transactions effected through the communication of electronically transmitted waves eg telephone.

[24] Consumer protection in the telecommunication industry is to be found in s 188(1)(a) and (b) and s 190(1)(b) Communication and Multimedia Act 1998 in the following words:

188(1) Any network facilities provider, network service provider, applications service provider or content applications service provider shall:

(a) deal reasonably with consumers; and

(b) adequately address consumer complaints.

190(1) Consumer code prepared by a consumer forum or the Commission shall include model procedures for:

(a) ...;

(b) the handling of customer complaints and disputes including an inexpensive arbitration process other than a court, and procedures for the compensation of customers in case of a breach of a consumer code; and/or

(c) ...;

[25] While the CMA 1998 was clearly enacted to, inter alia, provide for consumer protection in the telecommunications industry, the CPA 1999 is not intended to apply to the hearing of a dispute arising from the same industry.

[26] It appears obvious to me that the second respondent had elected the wrong forum to bring the dispute to the tribunal as it is outside the jurisdiction of the tribunal.

[27] The second respondent has a choice of suing in a civil court of law or alternatively lodge a complaint under s 188(1)(a) and (b) and s 190(1)(b) of the CMA 1998 for a resolution of the dispute and to get redress if any.

CONCLUSION

[28] As the award was made by the tribunal in respect of a subject matter beyond its jurisdiction and ultra vires, it is not legally sustainable, with the result that it is hereby quashed by way of certiorari.

Application allowed

Reported by Loo Lai Mee